NO. 91-548 (2)

Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

In re: WILLIAM W. CHOATE and all parties similarly situtated;
Petitioner,

VERSUS

THE FEDERAL LAND BANK OF WICHITA,
n/k/a The Farm Credit Bank Of Wichita,
Appellee.

PETITION FOR WRIT OF CERTIORARI

(APPEAL FROM SUPREME COURT OF THE STATE OF OKLAHOMA CASES 86,777; 70,205; and 73,343)

ON APPEAL FROM
THE DISTRICT COURT OF SEMINOLE COUNTY, OKLAHOMA
DISMISSED IN PART AND AFFIRMED IN PART

APPENDIX

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APPENDIX

NOT FOR PUBLICATION
THE COURT OF APPEALS OF
THE STATE OF OKLAHOMA
DIVISION III

THE FEDERAL LAND BANK OF WICHITA, Appellee,	
versus	Case Number 69,777 Consolidated with Cases 70,205 and 73,343.
WILIAM W. CHOATE, EDNA B. CHOATE, JOHN I. M. CHOATE, and GRETCHEN L. CHOATE, Appellants,	
and,	
JOHNNY E. JOHNSON, CAROL C. JOHNSON, FIRST NATIONAL BANK OF SEMINOLE, FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION OF SEMINOLE, AND THE UNITED STATES OF AMERICA, ex rel. INTERNAL REVENUE SERVICE, Defendants,	
and	
STATE OF OKLAHOMA, ex rel. ROBERT H. HENRY, ATTORNEY GENERAL OF OKLAHOMA, Intervenor.	

APPEAL FROM THE DISTRICT
COURT OF SEMINOLE COUNTY OKLAHOMA

HONORABLE GORDON R. MELSON, JUDGE
DISMISSED IN PART AND AFFIRMED IN PART

William W. Choate,
Seminole, Oklahoma, pro se,

Stanley Huser, Jr.,
Holdenville, Oklahoma. For Appellee

MEMORANDUM OPINION

Opinion by Carol M. Hansen, Judge:

This appeal is a consolidation of three appeals. In addition, Appellants filed three "Amended" Petitions In Error. However, only issues raised in the initial Petition In Error remain under consideration. The first appeal is from the trial court's judgment on a jury verdict. The second Petition In Error alleges error by the trial court in settling the journal entry of judgment on the jury verdict. Appellants brief on issue contained in the second Petition in Error which is not duplicative of issues raised in the first Petition in Error. The third consolidated appeal was in the name of John I.M. Choate only.

John Choate filed with this Court a multi-purpose pleading which, inter alla, notes he had settled the case with Appellee and that Appellee "released forever John or Gretchen Choate". Further, it purports to design John Choate's rights of appeal to William Choate and to substitute William Choate as the Appellant in the third appeal. Reading John Choate's pleading as a whole, we consider it to be, in effect, a motion to dismiss the consolidated appeal as to John and Gretchen Choate. Appellee expressly stated it had no objection to dismissal as to John and Gretchen. Accordingly, this appeal is dismissed as to John I. M. Choate and Gretchen L. Choate only. In view of the voluntary dismissal, any issue relating to the dismissed parties is now moot. Thus, no appeal rights remain to be transferred to the remaining appellants. Finally, because the third appeal was consolidated

with this appeal, there is no cause in which William Choate could be substituted as appellant.

The three "Amended" Petitions in Error, and Appellant Supplemental" Brief, pertain to trial court post-judgment determinations on a variety of motions. All three Amended Petitions were filed subsequent to completion of briefing by both parties, without leave of court, in violation of Rule 1.17, Rules of Appellate Procedure in Civil Cases, 12 O. S. 1981 Chap. 15, App. 2. Further, none of these petitions contains any allegation of error. It is a long standing and well established rule that Oklahoma appellate courts will not consider errors argued in briefs which are not presented by petition in error. Martin v. Harrah Independent School District, 543 P. 2d 1370 (Okla. 1975); Southwestern Cotton Seed Oil Co. v. Bank of Stroud, 12 Okl. 168, 70 P. 205 (Okla.

1902). Accordingly, we decline review of the errors alleged in Appellants' Supplemental Brief.

Appellants have four remaining propositions, which we will consider as presented. Appellants' allegations and arguments tend to be both disjointed and somewhat cryptic. Therefore, we are constrained to address what we understand to be the essence of the stated proposition.

The primary subject of this appeal is a promissory note executed by William and John Choate, (Choates), evidencing a loan is the Choates by Appellee (FLB). To secure this loan, Choates and their wives executed a mortgage on 360 acres of land. Subsequently, Choates made a lump sum payment of $20,000 to FLB. The purpose of this payment, and its effect on the loan, is a major point of contention. FLB treated the payment as consideration for release of 80 of the

360 acres pledged under the mortgage. They reduced the principal in the amount paid, but left the amount of the payments as they were. The reduction in principal would have resulted in an earlier payout and effectively reduce the term of the loan. Choates argue that the $20,000 constituted advance payment of principal in the periodic payments required under the terms of the loan, keeping the loan current several years into the future When Choates did not make payments as required by FLB, FLB declared the loan in default and brought this action to recover on the note and for foreclosure of the mortgage. The jury verdict found the note to be in default and awarded money judgment to FLB.

Choates first allege error in the trial court granting judgment on the jury verdict, arguing the note was never in default. In support of this position, they contend the $20,000 payment paid the principal ahead 13 years. Choates do not contend they were current in the payments

principal ahead 13 years. Choates do not contend they were current in the payments as demanded by FLB, only that such payments were not required in view of the "advance" $20,000 and that they were inconsistent with the note, which they argue had no acceleration clause. We find no support in the record for Choates' position. The note clearly provides for acceleration of the entire debt under the conditions set forth in the mortgage document, which is incorporated into the note by reference. The mortgage provides the secured debt will become due in the event mortgagor defaults with respect to any covenant or condition of the mortgage. One of the covenants in the mortgage is "...to pay when due all payments provided in the note secured hereby,". In the absence of timely periodic payments. Choates attempt to rely on the $20,000 lump sum payment to establish they were not in default.

Once again, the record does not support this position. Choates executed and submitted to FLB an Application for Loan Servicing on which they marked a box indicating they were applying for a "partial release" under the present loan. That application further contains the following statement:

> It is understood and agreed that the amount paid in consideration for granting the partial release ... shall be applied on the indebtedness secured by aforesaid mortgage in such manner as the Federal Land Bank of Wichita may elect.

The application form reflects approval, "provided $20,000 is applied to principal of loan". Choates' loan history, which they introduced, shows that the principal was reduced by the amount of the payment, less fees and interest, and that the amount on which

interest was computed was likewise reduced. The amount of principal reduction in each payment was increased. This method of recomputation was testified to by FLB's employee. Not only does the record fail to support Choates' argument, their own actions are inconsistent with a position that their payments were made in advance. The record contains a series of notifications of past due installments and correspondence from William Choate stating his intention to bring the loan "current". Choates did not present the advance payment argument until after this action was filed in the trial court.

In an action at law, the findings of the jury will not be disturbed on appeal if there is any competent evidence to support its findings. Shinn v. Francis, 404 P. 2d 1017,1021 (Okla.1965). The jury verdict granting judgment of default of the promissory note is fully supported by the record.

the record.

Choates' second and third propositions are more easily disposed of. The second alleges the trial court erred in disallowing intervention by the Oklahoma Attorney General to defend the constitutionality of the so-called "Moritorium Act", barring foreclosure against farmers for one year. We share Appellee's confusion regarding this allegation because the Attorney General was allowed to intervene on the only basis on which intervention was sought to convince the trial court to impose the moritorium. The court refused, declaring the law to be unconstitutional and proceeded with the case. The Attorney General withdrew from the case after the Oklahoma Supreme Court found the moritorium law to be unconstitutional. Federal Land Bank of Wichita v. Story. 756 P. 2d 588 (Okla. 1988). There is no perceived error and we will consider the intervention issue no further.

As the third proposition, Choates contend the trial court erred in overruling a motion to make the Administrator of the Veterans Administration a third party defendant. Without discussing the substance of the motion, we find Choates failed to preserve this alleged error for appeal by not including it in their timely motion for new trial. Appellants may not raise allegations of error which were available on filing a motion for new trial, but which were not asserted. 12 O. S. 1981 §991(b); Reeves v. Melton, 518 P.2d 57,64 (Okla. App. 1974).

Choates' fourth proposition contains two separate and unrelated allegations of error. The first of these allegations claims error in finding Choates had not established a prescriptive easement over the mortgaged land, which would have given them access to "Homestead

property", which is apparently not part of the land in question. Shortly before they filed this action in the trial court, Choates recorded a document purporting to grant an easement to themselves. Choates claim continual, exclusive, open and hostile use of a "right-of-way" since 1971. However, this use was over their own property. Such a claim is patently unmeritorious. An easement by prescription may be gained only by adverse, not permissive, use. Zimmerman v. Newport, 416 P.2d 622 (Okla. 1966); Schwab v. Menz, 376 P.2d (Okla. 1962). Choates provide no enlightenment as to how their use could be considered hostile or adverse. The trial court did not err in finding that any right, title or interest Choates may have in the "right-of-way" is junior and inferior to the rights of FLB.

Choates also allege error in relation to "trust claims". Choates contend in their brief that FLB assumed the role of their agent or trustee:

> ... in unilaterally without disclosure otherwise to them, undertaking to not only obligate their loan as collateral for securities themselves having no call provisions and necessitating obstructing their absolute loan guaranty rights as war veterans...

There is nothing in the record to show FLB ever obligated Choates' mortgage, or that FLB did not have a legal right to do so if it

had wished. Further, Choates' "trust" theory raised in its Answer and at trial related to a resultant or constructive trust allegedly created by the excessive amounts paid after the lump sum payment discussed above. The arguement was that the "excess" amounts in the periodic payments should have been considered held in trust. We can discern nothing in Choates' brief which leads us to conclude the arguement is directed to that theory. Choates may not raise this new theory for the first time on appeal. Home-Stake Production Company v. Minnis, 443 P.2d 91,99 (Okla. 1968).

For the foregoing reasons, subject to the DISMISSAL ordered above, the trial court's judgment is AFFIRMED.

GARRETT, P.J. and HUNTER, V.C.J. concur.

THE COURT OF APPEALS OF THE STATE OF OKLAHOMA
Division III

THE FEDERAL LAND BANK OF WICHITA Appellee, versus WILLIAM W. CHOATE, EDNA B. CHOATE, JOHN I.M.CHOATE AND GRETCHEN L. CHOATE Appellants.	Case Number 69,777

O R D E R

Appellants' Application for Stay of Proceedings with Authorities, filed November 26,1990, asked this Court to stay further proceedings pursuant to the Soldiers' and Sailors' Civil Relief Act, 50 U.S.C. app. §501 et seq. Appellants contend they are entitled to such stay pending termination of Appellant William Choate's period of temporary active duty service with the United States Air Force, specifically citing 50 U.S.C. app. §521. That section, in relevant part, provides:

> At any stage thereof any action or proceeding in any court in which a person in military service is involved... may, in the discretion of the court in which it is pending, ... be stayed... unless, in the opinion of the court, the ability of the plaintiff to prosecute the action,... is not materially affected by reason of his military service.

On November 27, 1990, this Court, under the authority of Rule 3.9, Rules on Practice and Procedure in the Court of Appeals, 12 O.S. 1984 Supp. Chap. 15, App. 3, granted Appellants an extension of twenty days in which to file a petition for rehearing. The extension is in

addition to the twenty days allowed by court rules. The November 27 order, however, deferred consideration of Appellants' application for stay pending further documentation and directed Appellants to provide copies of William Choate's military orders and an affidavit from his military commander verifying that William Choate's military service materially affected his ability to prosecute this action.

On November 29, 1990, Appellee filed its Response to Application for Stay of Proceedings objecting to a stay. Appellee contends Appellants were repeatedly granted continuances in the trial court on the same grounds presented here; that William Choate's service did not, and does not now, materially affect his ability in this case, and that the application for stay is being used for the purpose of delay.

On December 11, 1990, Appellants filed their Appellants' Response to Order of 27 Nov 90, stating the military orders and certification of duty were to be forwarded by separate letter to the Court. On or about December 12, 1990, this Court received a letter from Appellant William Choate, with attached copies of his military orders. In the letter, Appellant notes he will not provide this Court with the affidavit of his military commander. Appellant first argues it would be impractical because of distance and time to do so. He further contends that because it is the statutory duty of the Court to opine

whether he is materially affected by his military service, it would be improper for the Court to consider the "opinions" of either the commander or Appellee.

William Choate's military orders reveal that he has been ordered to temporary active duty at Carswell Air Force Base, Texas, for the period December 10 - December 21, 1990, and that he served at Grissom Air Force Base, Indiana, from November 5 - December 6, 1990. The orders further reveal he serves as a voluntary individual augmentee assisting in the provision of various legal services at the base level.

In view of Appellants' decision not to comply with the order to provide the verifying affidavit, the only support for Appellants' application, is the military orders and William Choate's conclusional assertions.

The Soldiers' and Sailors' Civil Relief Act is not construed to require a stay of proceedings on the mere showing that a service member is on active duty, even at a location away from his or her residence. Boone v. Lightner, 319 U.S.561, 63 S.Ct. 1223, 87 L.Ed.1587 (1943); Huckaby et al v. Oklahoma Office Building Co., 201 Okla. 141, 202 P.2d 996 (1949). In some cases, the duty location and military circumstances may create a presumption that ability to prosecute or defend an action is materially affec-

ted, but that is not the case here. A stay is not a matter of right, but is within the discretion of the Court. This "discretion" includes the discretion as to whom or what the Court may ask to be presented in order to make a fair judgment. Boone v. Lightner, at p. 1229.

Although William Choate is acting pro se, in the absence of the requested verification by his military commander, we are not convinced his military service in Texas will materially affect Appellants' ability to meet the filing schedule as modified by this Court's extension. We do not intend to denigrate either his service, or the contribution William Choate may be making to the resolution of legal problems at the military base level. However, we discern nothing to lead us to conclude that his presence at the place of temporary duty is of such vital interest to national security that he could not be spared sufficient time to prepare a petition for rehearing, if he chooses to do so. We also find he could have provided the ordered affidavit verifying his service, and that this Court's directing production of the affidavit was proper.

Appellants' Application for Stay of Proceedings is therefore DENIED.

This determination precludes the necessity for further response by Appellee to the appli-

cation for stay.

DONE BY ORDER OF THE COURT OF APPEALS this 20th day of December, 1990.

[signed]
CAROL M. HANSEN, JUDGE

HUNTER, V.C.J. and GARRETT, P.J. concur

CERTIFICATE OF SERVICE

William W. Choate, the undersigned, Petitioner, pro se, hereby certifies that he caused to be deposited in the United States Mail, Postage prepaid, Forty (40) like copies of the Appendix to the Petition for Writ of Certiorari (previously filed), to the Clerk of the Supreme Court of the United States, 1 First Street, N.E., Washington, D.C. 20543; and to:

Mr. Stanley Huser, Jr.
P. O. Box 511
Holdenville, OK 74848

William W. Choate
WILLIAM W. CHOATE

Dated: 30 Sept. 1991